

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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IN RE: VIOXX PRODUCTS  
LIABILITY LITIGATION

MDL No. 1657  
Section: "L"  
New Orleans, Louisiana  
Tuesday, January 3, 2006

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TRANSCRIPT OF MONTHLY STATUS CONFERENCE PROCEEDINGS  
HEARD BEFORE THE HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

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1 meeting we will be able to do it.

2 The first item on the agenda is the Lexis/Nexis File &  
3 Serve. Any report on that?

4 MR. WITTMANN: Yes, your Honor. We are still experiencing  
5 some brief delays between the docketing of cases in the Eastern  
6 District from the Judicial Panel of Multi District Litigation and  
7 the time they actually appear on the docket in the court here. It's  
8 not a long delay, we are still having some delays; and we continue  
9 to ask counsel, plaintiff's counsel to continue to notify my partner  
10 Dorothy Wimberly if a case is not available yet on Lexis/Nexis File  
11 & Serve because they are not available actually on Lexis/Nexis until  
12 they are docketed.

13 And I think people have been doing this, this is the same  
14 request we made at an earlier status conference, and it seems to be  
15 working well.

16 THE COURT: We are going to try to expedite it a little  
17 bit with a new format. I talked to the clerk's office and they are  
18 going to be able to e-mail the transfer order to the transferor  
19 courts with a request to the transferor court to e-mail the record  
20 in PDF format. So we will get it sooner in that fashion and we will  
21 be able to upload or do whatever we need to do. So that's going to  
22 be started by tomorrow.

23 State court trial settings is the next item on the agenda.

24 MR. WITTMANN: Yes, Judge. The New Jersey Superior Court  
25 has scheduled trials for either single or multiple plaintiffs in New

1 Jersey. The first date is February 27th, 2006, another date April  
2 24th, 2006 and June 5th, 2006. Merck has made it known to the judge  
3 we oppose multiple trials, and the judge has indicated she will  
4 entertain a motion to be filed later this month to decide on whether  
5 we try one plaintiff at a time or whether it be multiple plaintiffs  
6 being tried. But the actual lineup of the trial has not been set,  
7 just the dates have been set aside.

8 The Garza case we talked about before is expected to be  
9 set for trial in the first quarter of 2006. There is a conference  
10 tomorrow to decide that, to pick a date. The Guerra case is set for  
11 trial in Hidalgo County, Texas on April 17th, 2006. The Kozic case  
12 is set for trial in Florida Circuit Court in Hillsborough County on  
13 May 1st, 2006. And Judge Chaney in California in a coordinated  
14 proceeding has selected June 21st, 2006 for the trial of one more  
15 plaintiff cases in California. And there is a conference in  
16 February in which the actual plaintiff participating in the trial  
17 will be selected. Anderson is set for trial in the Tribunal Court  
18 of the Mississippi Choctaw Indians on August the 7th 2006. And the  
19 Zajicek case which was set for trial on March 20th, 2006 over in  
20 Texas has been taken off the trial calendar.

21 THE COURT: I've touched base with many of these state  
22 judges, and they are proceeding forward with the case. We are  
23 trying to swap ideas and swap information and swap various forms so  
24 that our respective lives can be made easier. I don't think anyone  
25 wants to reinvent wheels if they don't need to be reinvented, but we

1 will do the best we can. It's going to take some effort on the part  
2 of all of you to coordinate these proceedings so that we can have  
3 them going on several tracks at one time.

4 MR. HERMAN: Your Honor, I am advised by Mr. Seeger that  
5 the seven cases stated in Section II in New Jersey are definite  
6 trial dates.

7 THE COURT: All right. We talked about the selection of  
8 cases for federal court trials. As I mentioned to counsel on  
9 several occasions, I do think it's important in view of the fact  
10 that we have a number of cases set for trial in state court that we  
11 begin trying as many cases as we can in federal court in as many  
12 categories as we can deal with so that we can get some experience in  
13 the MDL, and hopefully at an appropriate time confer with my  
14 colleagues in the states and see whether or not we can make any  
15 sense out of what juries are doing in the various categories on  
16 various cases.

17 I favored them with the categories that we have been using  
18 in the MDL, and hopefully some of those categories can be tried at a  
19 state level. If we can do that then perhaps we can make some sense,  
20 draw some conclusions out of what juries across the country are  
21 doing on these various categories of cases. And hopefully that  
22 might help the attorneys look at this case a little more globally  
23 and see whether or not we can deal with it.

24 In that regard, I am interested in pushing the federal  
25 cases to trial. Now, I have a couple of problems with that. One

1 problem, of course, one group of cases is the cases filed in federal  
2 court in the Eastern District of Louisiana, those are cases that  
3 under Lexicon, I can try without the consent of anyone. The other  
4 group of cases are cases that have been filed in state courts  
5 throughout the country that need to either be transferred to this  
6 court or refiled in this court and dismissed in state court. In  
7 those latter groups of cases I need some consent from the parties,  
8 both sides. Otherwise they can't be refiled in this case and  
9 various stipulations made and various prescriptions waived and other  
10 matters taken care of. I wouldn't have jurisdiction, can't waive  
11 jurisdiction, but they may have problems with prescription and may  
12 have problems with venues and things of that sort. But those can be  
13 waived. The point is that with that group of cases, I need some  
14 consent from the parties in order to accomplish that.

15           We have about 1,000 cases filed in the Eastern District.  
16 Ordinarily we could get a group of cases from those thousand that  
17 are representative of the categories. Two hurdles in those groups  
18 of cases that we all have to recognize: One, is that they've just  
19 been filed so some of the discovery is not completed; and in order  
20 to get the discovery completed some focus has to be placed on those  
21 particular cases by the parties and prioritized.

22           But secondly, we're dealing with a problem that nature has  
23 inflicted upon us in 2005, that is a rather difficult situation. We  
24 have lawyers in this community, in this state that have been  
25 displaced. We have hospitals that have been inundated, there are no

1 records and things of that nature. So it's difficult to proceed  
2 with the Louisiana cases without some care.

3           And ordinarily I would not have any problem with it, I  
4 would simply say these are the cases we are going to try from  
5 Louisiana and get ready for them. I am mindful of the fact there  
6 are now different circumstances, lawyers are not available,  
7 witnesses are not available, records are not available, doctors are  
8 not available. So I am trying to deal with that and I need the  
9 cooperation of counsel to deal with it.

10           I've discussed it with them this morning and they are  
11 going to meet after this conference and see whether or not one last  
12 time they can agree on a pool of cases, and either they can agree to  
13 take from the pool or if they can't then I will pick from the pool.  
14 I am interested in the cases in that pool, I don't care where they  
15 come from, but cases in that pool should be indicative or  
16 representative of the categories and be instructive.

17           I don't want to try a case if it's the only case out of  
18 100,000 cases that is of that type, it won't help us. I need a case  
19 that's representative of a group of cases. Otherwise you're wasting  
20 your time because we are not going to be able to try every case in  
21 this proceeding. I heard the rhetoric and I listened to it, but  
22 that's not going to happen, all of us know that.

23           So we need to focus on groups of cases that mean  
24 something, so I will give the parties an opportunity to do it. If  
25 they can't, then I will just have to do it because I do want to get

1 on board with some trial experience. Otherwise we are going to have  
2 to just think about shutting the MDL down, we're going to have to  
3 begin sending cases back to state courts or back to the area from  
4 which they came because I am not going to be able to continue to be  
5 an MDL if throughout the country cases are being tried and no trials  
6 are being held in the MDL.

7 It becomes a black hole, it becomes an anchor, and that's  
8 not good for the litigants, it's not good for the lawyers, it's not  
9 good for anyone. It's not good for the system. So we need to begin  
10 trying cases.

11 Let me move to class actions.

12 MR. LEVIN: Your Honor, may I address you for a minute?

13 THE COURT: First let me hear from Mr. Herman, he wants to  
14 speak from the selection of the cases.

15 MR. HERMAN: Yes. Your Honor has said the Irvin/Plunkett  
16 trial is to be retried beginning February 6th. The defendants have  
17 chosen the Diaz case for the next case to be tried. I've been in  
18 communication with Ms. Cossich, who is a single practitioner from  
19 New Orleans who has been in Florida for four months practicing out  
20 of a small office in a church. I advised Ms. Cossich that the PSC  
21 who had members who were willing to assist in the trial of the case.  
22 She hopes to be back either yesterday or today into her office and  
23 home. I will provide the court today with her cell phone number.

24 We have filed a motion to set aside the Diaz case;  
25 however, I did have a conversation either Saturday or Sunday with

1 Ms. Cossich. She said she would be willing to work 16 to 18 hours a  
2 day to get that case ready. We do not believe we can get it ready  
3 by March 12th. We will be asking the court not to quash the case  
4 but for a 30 day extension of time to allow for preparation and to  
5 put a trial team together to be introduced to the perspective  
6 client, gather the records.

7 I understand by letter I received this morning from  
8 Mr. Wittmann, he's been in contact with some of the doctors which  
9 Ms. Cossich and I have been unable to reach. Nonetheless, we intend  
10 to continue those efforts. I say we, I am advised that a member of  
11 the trial team PSC from California, two from Florida and one from  
12 Louisiana who have yet to meet have all volunteered to assist in  
13 that case. And putting together a trial team that's never worked  
14 together before in a case where a single practitioner that's filed  
15 eight months ago who has been displaced for four months we can do  
16 and we are willing to do in order to support this MDL. We are going  
17 to need a little more time.

18 In terms of meeting this afternoon, Mr. Seeger will meet  
19 with defense counsel and attempt to work out a schedule on other  
20 cases to be tried. We are also advised this morning that there are  
21 4,050 suits filed in the MDL including 11,425 plaintiffs.

22 MR. WITTMANN: I just want to correct one thing, your  
23 Honor. I haven't actually contacted any plaintiff's physicians in  
24 the Diaz case, we know where they are. We've been able to locate  
25 all but one of those physicians and we have scheduled Mr. Diaz's

1 deposition for January 14th. I understand a motion to quash will be  
2 filed in connection with that deposition by the plaintiffs, but we  
3 indicated we wanted to work with them on the date, we just want to  
4 get a deposition and get this case moving forward.

5 THE COURT: As I mentioned to counsel, I want to talk with  
6 counsel in that case, so I will get her telephone number and I will  
7 set a status conference in the next day or two and we will talk  
8 about the situation.

9 Let's go to class actions. Mr. Levin, you had something?

10 MR. LEVIN: Yes, your Honor, just briefly. Motions with  
11 regard to the Medical Monitoring Complaint and the Purchase Claims  
12 Complaint are fully briefed. The plaintiff's motion for limited  
13 remand on the class action issues has been briefed. There is a  
14 plaintiff's motion for class certification on the master personal  
15 injury complaint. The defendant's brief is due sometime this week,  
16 our brief is due Jan 23rd. All three motions will then be ready for  
17 oral arguments, as the court schedules the same.

18 I believe that the issues on the roll call motion on the  
19 medical monitoring complaint overlapped with regard to conflict of  
20 law principles with the class certification and that if there is  
21 oral argument they should be held on the same day.

22 THE COURT: Okay. I will grant oral argument since a  
23 request has been made. And my position with oral argument is if a  
24 lawyer asks for it, he or she has something to say, I respect that  
25 and I grant it automatically. So if you ask for it, you get oral

1 argument here. So I will set it for oral argument and I will set  
2 the date, probably a special setting, coordinate it with counsel to  
3 make sure their schedules are consistent with mine, and I will set  
4 it as soon after the 23rd as I can.

5 MR. LEVIN: Thank you, your Honor.

6 THE COURT: Thank you. Discovery directed to Merck.

7 MR. HERMAN: Yes, your Honor. We are still awaiting  
8 substantial discovery as ordered on November 18th in PTO 22 as  
9 relates to foreign discovery. Your Honor, has under consideration a  
10 privilege log and several boxes of materials defendants claim are  
11 privileged --

12 THE COURT: Let's deal with them one at a time. With  
13 regard to the foreign discovery, what's the problem there, what's  
14 the situation? Let me hear from the defendants.

15 MR. WITTMANN: Your Honor, that is going forward,  
16 Mr. Barnett is here.

17 THE COURT: Mr. Barnett, would you tell us about the  
18 foreign discovery. What can we do to speed that up?

19 MR. BARNETT: Good morning, your Honor. We began as the  
20 court ordered producing the Merck Frosst custodial files on November  
21 18th and today we have produced six custodial files. We are  
22 currently I believe processing 37 additional custodial files from  
23 folks that work at Merck Frosst. And beyond that there are an  
24 additional 17.

25 Our original projected production date was January 18th,

1 but as we've discussed with the court, the problem is we are now  
2 faced with a frankly unprecedented level of case specific discovery  
3 that's been ordered in the New Jersey coordinated litigation. Days  
4 after that discovery was ordered we brought it to Mr. Herman's  
5 attention with the hopes that he could work out a priority in terms  
6 of production as he said he would do. We are still waiting for some  
7 sort of direction from him other than to produce everything now.

8 We will continue to do what we can to make these  
9 productions, but given the competing demands on our large production  
10 facility there is going to be unfortunately a slight delay in  
11 producing the Merck Frosst documents.

12 THE COURT: Let me hear from counsel on that, Mr. Herman,  
13 do you want to talk about that? Somebody on the -- do you want to  
14 speak on the case specific? What's the case specific?

15 MR. BUCHANAN: The competing demands that Mr. Barnett  
16 referred to arise out of orders issued in the New Jersey coordinated  
17 litigation but not for the coordinated litigation for specific  
18 plaintiffs that have a trial setting. There are seven trial  
19 settings or seven plaintiffs with three trial settings over the next  
20 six months in the New Jersey coordinated proceedings.

21 Specifically, as I understand it, the burden imposed by  
22 the defense by those orders relates to discovery sought from sales  
23 representatives that called upon the treating physicians in each of  
24 those seven cases.

25 To be clear, the discovery that's been ordered in those

1 cases there is case specific in nature and specific to the trial  
2 settings over the next six months.

3 THE COURT: Does it have anything to do with the foreign  
4 material?

5 MR. BUCHANAN: No, it does not, your Honor.

6 THE COURT: Mr. Barnett, what's the problem with that? I  
7 understand you have to have a certain number of people to do the  
8 work, but the discovery doesn't overlap. It's just you need  
9 resources, is that it?

10 MR. BARNETT: It's a question of how to allocate those  
11 resources, your Honor. We had consistent with discussions with the  
12 court and with the order worked out a priority production schedule  
13 that included the Merck Frosst documents as well as producing the  
14 Arcoxia documents, and we had a negotiated production priority  
15 schedule that was all laid out.

16 The problem is that when you get an order entered that  
17 effectively requires you to produce 90 custodial files from  
18 professional representatives as well as their personnel files, that  
19 throws a wrench in the works. And what our hope was, consistent  
20 with Mr. Herman's representation, that there would be discussions  
21 between the MDL lawyers and the New Jersey lawyers and that they  
22 would come to us with a unified production saying these are our  
23 priorities. Unfortunately what has happened is we're being told  
24 it's all a priority, it all must be done immediately.

25 And Merck has devoted extraordinary number of resources.

1 There was discussion in chambers about the numbers of attorneys and  
2 paralegals that are involved. But it's all coming out of the same  
3 facility, it's all of the same people that are doing the work. And  
4 unfortunately we find ourselves in a position where we're being  
5 caught between competing demands which we were hoping that  
6 Mr. Herman and the folks on the state liaison committee would be  
7 able to resolve for us. So we are not in a position of being  
8 accused either in this court or in New Jersey of delaying because  
9 that's not what our intention is, that is not what we were trying to  
10 do.

11 THE COURT: When were you to produce the documents?

12 MR. BARNETT: We will produce them as --

13 THE COURT: When were you supposed to be produce them?

14 MR. BARNETT: The original objective was to produce them  
15 by January 18th, 2006, and obviously is going to be some period of  
16 time after that. We will get them produced as quickly as we can,  
17 but it will have to take into account the other competing demands  
18 that we're getting in New Jersey.

19 THE COURT: Okay. I will make it easier for you. Let's  
20 produce them by the 30th and I will issue an order to that effect.

21 MR. HERMAN: Your Honor, may it please the court. I am  
22 often in error but I am never in doubt. And Mr. Herman has never  
23 agreed to interfere with a state court judge's order or a federal  
24 court judge's order. And, you know, that's the third time I've  
25 heard that and I've seen it in writing, and I'd appreciate it if you

1 would not ascribe to me some representation which I don't think I  
2 ever made.

3 THE COURT: He just feels that you can do everything,  
4 Mr. Herman.

5 MR. HERMAN: Your Honor --

6 THE COURT: It's a compliment to you.

7 MR. HERMAN: Your Honor, I used to be six five when this  
8 case started. I do want to say we have a trial again on February  
9 6th, they're producing on Jan 30th some 60 files that have to be  
10 reviewed that's going to be too late for motions in limine, we are  
11 not going to have the evidence in. It's like those 200,000 pages of  
12 documents they produced the day after Mr. Seeger's trial. But we  
13 will abide by your Honor's order, of course.

14 THE COURT: Let's go to the next one, Discovery  
15 Directed --

16 MR. WITTMANN: I have a couple of more items on this one,  
17 your Honor, if I may, on the discovery directed to Merck.

18 On November 22nd, 2005 the Plaintiff Steering Committee  
19 served upon the Defendant's Liaison Counsel a second set of  
20 interrogatories and requests for production of documents. On  
21 December 22nd we served our responses and objections. I understand  
22 the Plaintiff Steering Committee is reviewing our responses to that  
23 discovery.

24 THE COURT: All right.

25 MR. HERMAN: That's true, but I didn't want to skip over

1 the privilege log, Mr. Wittmann.

2 THE COURT: Let's go with the privilege log. I've got the  
3 boxes, that are about eight various boxes, it's about 80,000, 90,000  
4 documents. What I am doing is creating categories and I am going to  
5 do a sampling from each of the categories. I will look at the  
6 samples and make a decision as to that category and we will move on  
7 with it. But I will have that shortly hopefully.

8 MR. HERMAN: Your Honor, at the risk of being redundant, I  
9 do want to state that the Plaintiff's Steering Committee believes  
10 that according to the Fifth Circuit rulings, the privilege log  
11 itself is not what it should be. And after your Honor makes rulings  
12 we will still be left with the inability to brief or argue rulings  
13 because we will not have seen the documents; and if the privilege  
14 log is inadequate, then in effect we are blindfolded.

15 THE COURT: Let's take a look and see what we're dealing  
16 with after my rulings and then I will focus on the privilege log  
17 with regard to those other areas.

18 MR. HERMAN: I am pleased to report that we resolved an  
19 issue. Of course I didn't take part in it, Leonard Davis and the  
20 other side were able to resolve the insurance production issue. And  
21 in light of that I wore my University of Texas tie because Mr. Davis  
22 has an important matter later today.

23 Discovery directed to the FDA, there are essentially three  
24 issues, your Honor, I'll cover them briefly. We have received no  
25 reply from the FDA as to the cost of reproducing documents.

1 THE COURT: Who did you write to?

2 MR. HERMAN: We wrote to two people.

3 THE COURT: Why don't you get that to me and then I will  
4 ask them to respond to me.

5 MR. HERMAN: The name escapes me, but I will get it to  
6 you. It's the lawyer for the FDA, as well as the FDA  
7 representative.

8 Secondly, we have a privilege log, the FDA has now given  
9 us with numerous redactions and Mr. Arsenault and Mr. Irpino are  
10 reviewing that. We have requested the deposition of Dr. David  
11 Graham from the FDA, we have had no response, we will be bringing a  
12 motion before your Honor shortly on that issue.

13 THE COURT: Okay. Discovery directed to third parties.

14 MR. HERMAN: Really is nothing to report at this time,  
15 your Honor.

16 THE COURT: What about deposition scheduling is the next  
17 item.

18 MR. HERMAN: We've requested that the defendants provide  
19 us by next Monday a list of every deposition that's been taken, the  
20 date of the deposition, the name of the deponent, the attorneys  
21 involved in the case so that we can compare it with our deposition  
22 depository. And that should resolve any colloquy or discussion as  
23 to what depositions have been taken and which depositions we have  
24 and which we don't have.

25 THE COURT: Any problem from the defendants on doing that?

1 MR. WITTMANN: No, your Honor.

2 THE COURT: All right.

3 MR. HERMAN: There have been some cross notices issued by  
4 the defendants in California, for example, where we haven't gotten a  
5 contemporaneous notice. I'm sure it's an oversight, but we would  
6 ask on any cross notices that the PSC receive a contemporary cross  
7 notice. It has not happened a great deal, it's been infrequent.

8 The New England Journal of Medicine depositions, we've  
9 opposed as well as the attorney Mr. Shaw for the New England  
10 Journal. The defendants wish to take those depositions, your Honor  
11 has indicated that a formal notice should be filed, formal  
12 opposition should be filed and that your Honor will set those  
13 hearings very quickly.

14 THE COURT: Right. I received a letter from Mr. Shaw  
15 representing the New England Journal of Medicine, and he indicates  
16 that he is going to oppose the deposition. So what I would like to  
17 do is have those notices as quickly as possible --

18 MR. WITTMANN: I will file them today, your Honor.

19 THE COURT: -- to give him an opportunity to oppose and I  
20 will set an immediate conference or hearing, and I will hear from  
21 the parties and I will rule on that.

22 The next item is the State/Federal Coordination - State  
23 Liaison Committee, anything?

24 MS. BARRIOS: Yes, your Honor. Happy New Year to you and  
25 your staff. We again update the remand order request that you had

1 given to the State Liaison Committee. I provided copies to  
2 plaintiffs and defendants and I will like to give it to Mr. Wynne.  
3 This month we only have three new cases to add, but next month we  
4 will do a cumulative CD ROM with all of the hyperlink pleadings for  
5 your Honor.

6 THE COURT: All right.

7 MS. BARRIOS: Mr. Len Fodera of our committee made a  
8 formal presentation to Judge Higbee at her last conference about the  
9 MDL. She expresses her sincere appreciation for receipt of the  
10 transcripts and also was very impressed by the efficiency in which  
11 you ran the Irvin/Plunkett trial, and she plans to utilize your  
12 procedures in her next trial settings.

13 THE COURT: Because of the litigants and the lawyers, I  
14 just didn't stand in their way.

15 MS. BARRIOS: And lastly, your Honor, we have made a  
16 presentation to a Vioxx litigation group on the status of the MDL  
17 which was very well received, and we think that we are in a position  
18 to assist the PSC in any respects; and we have been working closely  
19 in particular with Mr. Arnold Levin on some projects he has given  
20 us. Thank you, your Honor.

21 THE COURT: All right. One item I overlooked or we didn't  
22 talk about was the plaintiff profile form and the Merck profile  
23 form. Do you want to revisit that?

24 MR. WITTMANN: Yes, your Honor. If I may address the  
25 plaintiff profile form. As of December 26th we received 3,240 PPF

1 responses. Some of those really weren't PPF responses, I think they  
2 were intended. Some 400 of them were intended to be claimant  
3 profile forms mistakenly sent as plaintiff profile form responses.

4 But we have about 600 of those in the process right now  
5 and 563 of them have been found to be deficient to one extent or  
6 another. I don't want to go into the reasons for all of the  
7 deficiencies, but I want to mention some categories that are  
8 significant that plaintiffs' counsel need to address when they're  
9 filling out these profile forms.

10 First we're getting virtually blank or incomplete  
11 plaintiff profile forms in many cases. We've had over 300 plaintiff  
12 profile forms giving us only the plaintiff's name, civil action  
13 number and plaintiff's current address. We can't do anything with  
14 those profile forms, it's just impossible for us to work with. We  
15 received from several firms multiple plaintiff profile forms that  
16 are illegible and written in handwriting that is difficult to  
17 decipher. Again, we can't deal with those kinds of profile forms.  
18 We have profile forms that don't include the civil action number,  
19 we've got profile forms that don't list the names of the treating  
20 physicians or the prescribing physicians.

21 We're in the process of notifying plaintiffs' counsel of  
22 the deficiencies as soon as we get to them and trying to work with  
23 them to get the profile forms up to date. We've also provided  
24 Mr. Herman with a letter that we believe if it was sent to all  
25 counsel notifying them of exactly what they need to fill in on these

1 profile forms that it would be very helpful in getting the  
2 information that we need in order to begin work on the Merck profile  
3 forms.

4           And we are encountering a lot of difficulties with  
5 plaintiff profile forms and some lawyers, for example, even though  
6 we've notified them that they have not filed profile forms, we have  
7 about 40 plaintiffs who have not filed a profile form at all, even  
8 after having been notified by Merck that they haven't filed one.  
9 And they just continue not to pay any attention to it. So those we  
10 will be bringing a motion to dismiss on those cases to you.

11           But we have a lot of problems with the forms, and I would  
12 just urge the plaintiffs' lawyers to really do their best to do a  
13 complete job on filling in the profile forms to help us get started  
14 on the Merck profile form.

15           THE COURT: Any comment from plaintiffs?

16           MR. HERMAN: Yes, your Honor. Basically we are going to  
17 object to any dismissals in hurricane affected areas. Lawyers don't  
18 have offices, they can't find their clients, hospital records have  
19 been destroyed. I don't know how many of these come from South  
20 Louisiana, Mississippi or Florida or the western part of Louisiana  
21 that was ravaged by Rita. I do know there were three hospitals down  
22 in Lake Charles for more than four months.

23           As far as the inability to complete forms, we will again  
24 send out a letter and notify the folks that we have or will have it  
25 posted on Lexis/Nexis which may be the best way to get a universal

1 without many lawyers that only have electronic access right now or  
2 who are operating from cell phones. It doesn't do us any good to  
3 mail them because they are not getting mail.

4 I will point out that our firm, which is moving back to  
5 New Orleans yesterday through next week, we've been getting a three  
6 day to two week delay in ordinary mail, and I think people know  
7 where we are. So it doesn't seem to me if there are 300 out of more  
8 than 3,000 that 10% is a big problem right now.

9 THE COURT: I will keep an eye on it. We have to move  
10 along with the profile forms, you need the profile forms. What I  
11 think would be helpful is if you gave to me some kind of notice in a  
12 fashion and form that you would like it to be in, and I can take a  
13 look at it and put it in the form that I am comfortable with and put  
14 it on the web site and I will urge from the court standpoint.

15 I hear the plaintiffs, I understand the situation, but  
16 there's going to come a time when notwithstanding Herculean efforts  
17 and everything else that some folks are just not getting around to  
18 the profile form. And in that instance after a number of  
19 opportunities to fill them out has been afforded counsel, afforded  
20 the litigants, then you need to file a motion and I will order them  
21 to come into court and explain why they haven't done it. If they  
22 fail to come into court, then I will have no alternative but to  
23 dismiss their case.

24 But in a case like this with the numbers that we're  
25 dealing with, we've got to assume that there are going to be some

1 folks that are no longer interested in pursuing the case; and if  
2 that's the situation, they ought not inhibit, drag or utilize  
3 resources for people who are interested in pursuing their case. We  
4 may not be there yet, but let's continue to move it along because we  
5 are going to get to a point where I am going to have to step in and  
6 dismiss the cases.

7 MR. HERMAN: Your Honor, with respect to the Merck profile  
8 form, defendants have requested a modification of the court ordered  
9 profile form to which we do not consent. Merck's counsel has  
10 advised that they can provide 95% of the information. I'll meet  
11 with Mr. Marvin as soon as we conclude and attempt to see if we can  
12 resolve the issue, but I would be less than candid if I said that  
13 coming at a late date that a modification at this time seems  
14 difficult. But we will make a good faith effort to reach some  
15 common ground.

16 THE COURT: All right.

17 MR. HERMAN: In terms of --

18 THE COURT: Pro se claimants, anything on that?

19 MR. HERMAN: There's nothing new, your Honor. The motion  
20 for clarification filed by Motley Rice, we would like to have  
21 considered at the next status conference setting, your Honor.

22 THE COURT: What is that about?

23 MR. HERMAN: They questioned the percentage of fee that  
24 your Honor has ordered in terms of common benefit.

25 THE COURT: All right. You discuss it with him and let me

1 deal with it next time.

2 MR. HERMAN: Yes, your Honor.

3 THE COURT: Anything further from anyone? Mr. Becnel.

4 MR. BECNEL: Your Honor, I have submitted a case from  
5 Monroe, Louisiana to be tried. I just asked Mr. Meunier, we had a  
6 conference call three weeks ago at length about criteria. But I am  
7 afraid he may not have gotten the mail. He just told me he didn't  
8 get it yet, and considering what Mr. Herman just told me, I am in  
9 shock. I didn't realize it was that bad here.

10 But I would like, it's an 18 month plus case, it's a  
11 school teacher, it's a heart attack case, it has over 100,000 in  
12 medicals, we are ready to go. I don't know what procedure I've got  
13 to go through, and it's filed in Louisiana in the MDL.

14 THE COURT: Okay.

15 MR. HERMAN: We will be happy to have that case tried and  
16 I'll send somebody to your office if you would like, Mr. Becnel, to  
17 pick up whatever it is you've transmitted.

18 MR. BECNEL: I will bring it tomorrow.

19 THE COURT: Mr. Becnel, get with Mr. Herman then get with  
20 Mr. Wittmann and let me hear from you all and we will deal with it.

21 MR. HERMAN: Your Honor, we have a new address, we will be  
22 posting it. It's Place St. Charles, 201 St. Charles Avenue, New  
23 Orleans 70170, the office is 4310.

24 THE COURT: Our next meeting?

25 THE DEPUTY CLERK: Thursday, February 2nd.

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THE COURT: February 2nd is the next meeting, ten o'clock,  
and I will meet with liaison counsel at nine. All right. Thank  
you. The court will stand in recess.

THE DEPUTY CLERK: Everyone rise.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

\* \* \* \* \*

REPORTER'S CERTIFICATE

I, Karen A. Ibos, CCR, Official Court Reporter, United States  
District Court, Eastern District of Louisiana, do hereby certify  
that the foregoing is a true and correct transcript, to the best of  
my ability and understanding, from the record of the proceedings in  
the above-entitled and numbered matter.

\_\_\_\_\_  
Karen A. Ibos, CCR, RPR  
Official Court Reporter